COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM 35 CENTS PER NUMBER

APRIL, NINETEEN HUNDRED AND ELEVEN.

NOTES.

SERVICE OF PROCESS BEYOND THE JURISDICTION.—At common law, except in the event of a voluntary appearance, actual service of process within the territory of the court was an essential prerequisite to the exercise of jurisdiction in a personal action.[1] While recognizing no limit to legislative authorization of means for acquiring jurisdiction so far as domestic recognition was concerned,[2] the English courts from an international point of view have denied the power of a foreign sovereignty to extend its jurisdiction to persons beyond its territory,[3]

[1]See *In re* Busfield (1886) L. R. 32 Ch. Div. 123; Hollingsworth *v.* Barbour (1830) 4 Pet. 466.

[2]Wharton, Confl. of L. § 713; Ashbury *v.* Ellis L. R. [1893] A. C. 339; Bell & Co. *v.* Antwerp etc. Line L. R. [1891] 1 Q. B. 103; see Sirdar Gurdyal Singh *v.* Rajah of Faridkote L. R. [1894] A. C. 670; *Ex parte* Blain (1879) L. R. 12 Ch. Div. 522.

[3]Buchanan *v.* Rucker (1808) 9 East 192; Schibsby *v.* Westenholz (1870) L. R. 6 Q. B. 155.

unless they were subject thereto by virtue either of domicile or citizenship.[4] In the United States, the rule so formulated has been adopted not only for the purpose of determining whether the judgment of a sister State is entitled to full faith and credit,[5] but also, it would seem, for the purpose of determining whether a State in authorizing the extraterritorial acquisition of jurisdiction has violated due process.[6] The soundness of the latter position is *a fortiori* apparent in that the principles, by the application of which a State's judgment, and consequently the extent of its jurisdiction, is accorded extraterritorial recognition, are adopted in order to establish its intraterritorial validity.[7] That the theoretically unlimited jurisdiction incident to sovereignty,[8] is not unduly restricted, would appear from the necessity of preventing encroachment upon and consequent destruction of, the independent character of the various States. For inasmuch as the judgment of a sister State can be denied full faith and credit only upon jurisdictional grounds, the final determination that a particular method of serving process beyond its territory constitutes due process would, in that the jurisdiction of the court is thereby established, conclude the courts in this respect, upon extraterritorial consideration of its validity.

As the power of the State to acquire jurisdiction extraterritorially is to this extent generally recognized, it is necessary to determine by what methods this may be accomplished. The common law rule as to service of process was based primarily upon the idea that no man could be justly judged without having been afforded notice and an opportunity of being heard.[9] It is clear that consistently with this conception of justice, it is competent by legislative enactment to provide for other means of acquiring jurisdiction,[10] and therefore under circumstances rendering personal service impracticable, constructive service has been commonly authorized.[11] As to persons within the jurisdiction, these provisions, where they afford reasonable probability of notice, have been uniformly upheld as constituting due process.[12] Where, however, jurisdiction is sought as to persons outside of the territory,

---

[4]Douglas *v.* Forrest (1828) 4 Bing. 686; Maubourquet *v.* Wyse (1867) 1 Ir. Rep. C. L. 471; see Becquet *v.* MacCarthy (1831) 2 B. & Ad. 951; Schibsby *v.* Westenholz *supra;* Wharton, Confl. of L. § 649.

[5]D'Arcy *v.* Ketchum (1850) 11 How. 165; Huntley *v.* Baker (N. Y. 1884) 33 Hun 578; Biesenthall *v.* Williams (Ky. 1864) 1 Duvall 329; Hamill *v.* Talbott (1897) 72 Mo. App. 22; see Cassidy *v.* Leitch (N. Y. 1877) 2 Abb. N. C. 315; *contra* De la Montanya *v.* De la Montanya (1896) 112 Cal. 101.

[6]Pennoyer *v.* Neff (1877) 95 U. S. 714; Continental Bank *v.* Thurber (N. Y. 1893) 74 Hun 632, aff'd 143 N. Y. 648; Botna etc. Bank *v.* Silver City Bank (1893) 87 Ia. 479; Harryman *v.* Roberts (1879) 52 Md. 64; Wallace *v.* United Electric Co. (1905) 211 Pa. St. 473; Wilson *v.* American etc. Co. (1903) 65 N. J. Eq. 730.

[7]See Lafayette Ins. Co. *v.* French (1855) 18 How. 404; Hoyt *v.* Alloway (Ind. 1827) 2 Blackf. 108; Wharton, Confl. of L. § 713.

[8]See 11 COLUMBIA LAW REVIEW 262.

[9]See *In re* Busfield *supra;* Credits Gerundeuse *v.* Van Weede (1884) L. R. 12 Q. B. Div. 171; Simon *v.* Craft (1901) 182 U. S. 427.

[10]Betancourt *v.* Eberlin (1882) 71 Ala. 461; Biesenthall *v.* Williams *supra;* Beard *v.* Beard (1863) 21 Ind. 321; Schwinger *v.* Hickok (1873) 53 N. Y. 280.

[11]Bardwell *v.* Collins (1890) 44 Minn. 97; Schwinger *v.* Hickok *supra.*

[12]See note 50 L. R. A. at p. 585.

it must be predicated upon some relation which the defendant bears to the sovereignty, by virtue of which its laws may be binding upon him.[13] Manifestly where the defendant is a non-resident and a citizen of another State, there is no such relation,[14] but a person who is a citizen of or is domiciled within a State which provides for a constructive service, does bear a relation to that State, by virtue of which he is subjected to its laws, and which he does not terminate by anything short of a definite abandonment.[15] Proceedings taken against him in accordance with its laws by means of substituted service have been recognized as due process of law.[16] In a recent case, however, *Raher* v. *Raher* (Ia. 1911) 129 N. W. 494, a domestic personal judgment rendered against a resident founded upon personal service of process without the jurisdiction, was held invalid as violative of due process.[17] The prevailing opinion while recognizing the validity of substituted service upon like facts, denied the efficacy of process beyond the territorial limits of the sovereignty. It is true that in substituted service there is no attempt to extend the actual process of the court beyond the territory, but to admit this is to admit as well that jurisdiction may be acquired without so extending it, because of the relation subsisting between the State and the individual over whom jurisdiction is sought. In so far as process is an instrument of the sovereign authority, its efficacy as such must be coterminous with the territorial extent of such authority.[18] But when it is served beyond the territory, it does afford actual notice,[19] and in this character would seem to constitute no encroachment upon the sovereignty.[20] Moreover, in view of the impor-

[13]Schibsby *v.* Westenholz *supra;* McEwan *v.* Zimmer (1878) 38 Mich. 765; Price *v.* Hickok (1866) 39 Vt. 292.

[14]Schibsby *v.* Westenholz *supra;* Copin *v.* Adamson (1874) L. R. 9 Exch. 345; Mitchell, Vance & Co. *v.* Ferris & Co. (Del. 1875) 5 Houst. 34.

[15]Story, Confl. of L. § 540; Black, Judgments (2 ed.) § 237; Huntley *v.* Baker *supra;* Sturgis *v.* Fay (1861) 16 Ind. 429; Dennick *v.* Dennick (N. Y. 1895) 92 Hun 161; see Schibsby *v.* Westenholz *supra;* Mitchell, Vance & Co. *v.* Ferris & Co. *supra;* Arnsbaugh *v.* Exchange Bank (1885) 33 Kan. 100.

[16]Continental Nat. Bank *v.* Thurber *supra;* Huntley *v.* Baker *supra;* Botna etc. Bank *v.* Silver City Bank *supra;* see Cassidy *v.* Leitch *supra; contra* De la Montanya *v.* De la Montanya *supra.*

[17]It might conceivably be suggested that the mere rendition of a judgment void for want of jurisdiction would not operate as a deprivation of liberty or property, and as the due process clause does not apply to matters of procedure, York *v.* Texas (1890) 137 U. S. 15; Kauffman *v.* Wooters (1891) 138 U. S. 285; 5 COLUMBIA LAW REVIEW 436; but cf. Pennoyer *v.* Neff *supra,* the question would not seem to be raised until an attempted enforcement. Where the judgment is sought to be established in another State for this purpose, since the State must first make the judgment its own, Wharton, Confl. of L. § 646, the question would, in accordance with this reasoning, arise only then. York *v.* Texas *supra;* Kirkpatrick *v.* Post (1895) 53 N. J. Eq. 591.

[18]Story, Confl. of L. § 539; see Pennoyer *v.* Neff *supra;* McEwan *v.* Zimmer *supra.*

[19]See Credits Gerundeuse *v.* Van Weede *supra.* The objection that knowledge from whatever source would be of like effect, Ewer *v.* Coffin (Mass. 1848) 1 Cush. 23, is not a valid one, for the binding effect would result from the statutory authorization with respect to a person subject to its laws.

[20]See Lafayette Ins. Co. *v.* French *supra;* Hilton *v.* Guyot (1895) 159 U. S. 113.

tance of notice,[21] reasonable probability thereof would seem to furnish the requisite test of due process.[22] It is arguable therefore that extraterritorial service, insuring as it does actual notice, as distinguished from substituted service, where the defendant may be left in actual ignorance of the proceedings against him, should not be regarded as violative of due process.[23]

WHAT CONSTITUTES A PROMISE TO ANSWER FOR THE DEBT OF ANOTHER WITHIN THE STATUTE OF FRAUDS.—There have been few sources of litigation more prolific than that section of the English Statute of Frauds which, together with its American counterparts, requires that a promise to answer for the debt, default or miscarriage of another be in writing.[1] Yet in view of the accepted judicial construction of the Statute that only those promises which are collateral fall within either its letter or its spirit, it is necessary in a given case to determine only[2] if the defendant's promise which in terms is to answer for another's obligation, is in truth an undertaking of guaranty, for if it is absolute and not conditioned upon another's default, it is original and may be made orally.[3] In determining this question it was early declared that any new consideration, whether of harm to the promisee or of benefit to the promisor, was sufficient to avoid the operation of the Statute.[4] The manifest inadequacy of this test, which in effect repeals the Statute, lies in the fact that, embodying only the requirement which attends every binding promise, it suggests nothing further to indicate its nature or to vary its legal consequence. Nevertheless, the position taken by Chancellor Kent, although generally discredited, is perhaps the pivotal point of subsequent doctrines by which it is variously modified.

The limitation imposed in some jurisdictions, of which Massachusetts is typical, restricts original promises to those made in the course of a transaction from which it may fairly be inferred that the leading object of the promisor was to obtain some benefit which enured to him by reason of his promise.[5] The English courts, however, deny that it

---

[21]Kilburn *v.* Woodworth (N. Y. 1809) 5 Johns. 37; Betancourt *v.* Eberlin *supra.* Even in proceedings *in rem,* where jurisdiction over property is conferred by force of its location, due process may be violated where reasonable notice is not afforded to the owner. Roller *v.* Holly (1900) 176 U. S. 398.

[22]Betancourt *v.* Eberlin *supra;* Matter of Empire City Bank (1858) 18 N. Y. 199, 215; Roller *v.* Holly *supra;* see Happy *v.* Mosher (1872) 48 N. Y. 313; Pinney *v.* Providence etc. Co. (1900) 106 Wis. 396; Pennoyer *v.* Neff *supra.*

[23]*Cf.* 5 COLUMBIA LAW REVIEW 436.

[1]29 Car. II c. 3, § 4.

[2]It is fundamental that if the promise is made to the debtor it is not within the Statute. See Clark *v.* Jones (1887) 85 Ala. 127.

[3]Browne, Statute of Frauds (5th ed.) § 212. See Gibbs *v.* Blanchard (1867) 15 Mich. 292; Baldwin *v.* Hiers (1884) 73 Ga. 739.

[4]Chancellor Kent in Leonard *v.* Vredenburgh (N. Y. 1911) 8 Johns. 29. See also Farley *v.* Cleveland (N. Y. 1825) 4 Cow. 432; Scott *v.* Thomas (1832) 2 Ill. 58. But see Mallory *v.* Gillette (1860) 21 N. Y. 412.

[5]Nelson *v.* Boynton (Mass. 1841) 3 Metc. 396; Curtis *v.* Brown (Mass. 1850) 5 Cush. 488; Furbish *v.* Goodnow (1867) 98 Mass. 296; Ames *v.* Foster (1871) 106 Mass. 400. And see Alger *v.* Scoville (Mass. 1854) 1 Gray 391; Emerson *v.* Slater (1859) 22 How. 28; Davis *v.* Patrick (1891) 141 U. S. 479.